NOS. 14-2222, 14-2339

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NESTLÉ DREYER'S ICE CREAM COMPANY,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON PETITION TO REVIEW AND APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER-CROSS-RESPONDENT NESTLÉ DREYER'S ICE CREAM COMPANY

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Oral Argument Requested

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I. THE "OVERWHELMING-COMMUNITY-OF-INTEREST TEST" VIOLATES THE NATIONAL LABOR RELATIONS ACT.

This case turns largely on the meaning of this Court's decision in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995). Neither the National Labor Relations Board (the "Board") nor the International Union of Operating Engineers Local 501, AFL-CIO (the "Union") asks this Court to overturn *Lundy Packing*. Instead, they insist that the test announced in *Specialty Healthcare*, 357 NLRB No. 83 (2011) – and therefore the Board's decision in this case – is entirely consistent with *Lundy Packing*.

This is incorrect. The same infirmities that led this Court to reject the "overwhelming community of interest" test in *Lundy Packing* are present in the Board's current iteration of the test. Both the Board and the Union misstate this Court's holding in *Lundy Packing*, asserting that the decision was based on a presumption that the unit chosen by the union in that case was appropriate. But a careful reading of *Lundy Packing* shows that the Court's concern with the "overwhelming" test was that it allowed two groups of employees with "meager differences" to be separated into multiple bargaining units. That flaw is just as present in the test created by *Specialty Healthcare*. Thus, the test should fall here just as it fell in *Lundy Packing*.

In an effort to shore up the flaws in the standard, the Board and the Union continue to overstate its pedigree. They cite nearly any case that they can find mentioning the phrase "overwhelming community of interest," regardless of who used the phrase, the context in which it was used, and whether it was part of the Board's holding. Again, a close reading of the Board's prior case law establishes that the test adopted in *Specialty Healthcare* has no support in the Board's precedents (except for *Lundy Packing*, of course).

A. The Test Announced by the Board in *Specialty Healthcare* Is Flawed for the Same Reasons that *Lundy Packing* Was Rejected.

The Board and the Union argue that the test created in *Specialty Healthcare* is different from the test rejected in *Lundy Packing* because the *Specialty Healthcare* test requires the Board to make a preliminary finding that the employees in the proposed bargaining unit share a nominal community of interest. But this difference matters only if it was this lack of a preliminary finding that drove this Court to reject the *Lundy Packing* test. A proper review of *Lundy Packing*, however, demonstrates that the reason the Court rejected the test was not because the lack of a preliminary finding of a nominal community of interest. Rather, what drove the Court's decision was the fact that the test allowed two groups of employees to be segregated into separate bargaining units based on "meager differences," due to the weight of the "overwhelming community of interest" factor. And this weight is identical in the Board's current iteration of the

"overwhelming community of interest" test, announced in *Specialty Healthcare*. For the same reasons that this Court struck down the test in *Lundy Packing*, it should strike down the test here.

Both the Board and the Union argue that this Court's problem with the standard rejected in *Lundy Packing* was that the Board presumed that any union-proposed unit would be appropriate. They are correct that *Lundy Packing* contains some language to that effect. *See* 68 F.3d at 1581 ("By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization."). And they are also correct that the *Specialty Healthcare* test explicitly requires the Board to find that a union's proposed unit shares a nominal community of interest before the Board applies the second half of its test – the "overwhelming" standard. 357 NLRB No. 83 at 9 ("In making the determination of whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a community of interest." (quotation marks omitted)).

But *Lundy Packing*'s problem with the test was not a presumption in favor of the union-proposed unit. It was the weight on the scales applied by the "overwhelming" standard, *i.e.*, the exact same standard used in *Specialty Healthcare*. There is no indication whatsoever in either the Board's or this Court's

opinions in *Lundy Packing* that the union's proposed unit in that case somehow lacked a basic community of interest. As a production-and-maintenance unit, it is beyond dispute that the proposed unit in *Lundy Packing* had the basic community of interest that *Specialty Healthcare* requires. Neither the Board nor the Union suggests otherwise.

Reviewing this Court's *Lundy Packing* decision makes clear the flaws in the Board's test. All of the Court's analysis is based on comparing the included employees to the excluded employees using the community of interest factors and noting the strong similarities and "meager differences" between the two groups:

> Under this traditional method of analysis, the excluded quality control employees at Lundy appear to qualify for inclusion in the appropriate bargaining unit. The QA/LTs performed functions that were integral to the production process. In fact, they spent approximately 80 percent of their time on the production floor where they tested the cleanliness of the facility, obtained temperatures of hogs and products, and otherwise inspected the production line. The remaining 20 percent of their time was consumed in an office recording the results of their testing. The LTs spent about 15 percent of their time taking samples and 85 percent of their time performing tests in a laboratory. All these employees shared a great deal with the production and maintenance employees who were included in the Unions' proposed unit: (1) comparable wages; (2) identical benefits; (3) the performance of tasks essential to the production process; (4) similar educational backgrounds; (5) interaction on the production floor; (6) close physical proximity; (7) the same cafeteria, parking lot, break rooms, and locker room; and (8) similar performance evaluations.

> The excluded quality control employees did differ in a few respects: (1) the method for calculating their earnings; (2) supervision; and (3) a lack of interchangeability with other P&M positions (other P&M employees did not perform the work of quality control employees in their absence). Such differences, however, were not unique to the quality control employees. . . . The exclusion of quality control employees based on such meager differences is, to say the least, problematic under the "community of interest" standard, when such employees were engaged in tasks essential to the company's meat packing and processing operation.[1]

Lundy Packing, 68 F.3d at 1580-81.

"Given the community of interest between the included and excluded employees," the Court concluded that exclusion of the employees could be effected only by a standard that allows exclusion of employees at the union's will absent a

[1] The maintenance employees in this case are just as essential to Dreyer's operations as the excluded employees were to the employer's operations in *Lundy Packing*. As the Board itself noted in its brief, the maintenance employees' "primary responsibility is to keep the [plant's] equipment running." (Board Br. at 6.) While the production employees can perform much of the routine maintenance on their own, the plant cannot operate for long stretches without the maintenance employees in their positions.

The actions of a maintenance-employee bargaining unit would thus dictate the terms and conditions—and even the availability of work—for the production employees. Should the maintenance employees cause a work stoppage, no complex breakdowns could be fixed, and production would cease. Thus, without any input of their own, the 600 production employees could easily lose their ability to work solely as the result of a decision made by the maintenance employees. In the same way, many terms and conditions of employment that are agreed to between Dreyer's and a maintenance-employee union are likely to have impacts on the production employees, despite the fact that the union would have no duty to consider (or any interest in considering) the concerns of production employees. For the same reasons that this Court articulated in *Lundy Packing*, excluding the production workers would have a far-reaching effect on their employment. Relying on the "overwhelming-community-of-interest" standard to exclude these employees is inconsistent with Section 9(c)(5) of the Act.

showing that the excluded employees share an "overwhelming community of interest" with the proposed unit. *Id.* at 1581. The Court then held that the effect of such a heightened requirement effectively meant that the excluded employees "were excluded in large part because the Petitioners do not seek to represent them." *Id.* (quotation marks omitted). As a result, the application of this "overwhelming" standard effectively according controlling weight to the extent of organization, in violation of 29 U.S.C. § 159(c)(5). *Id.*[2]

The portion of the test rejected by this Court – the requirement that anyone opposing a union-proposed unit show that excluded employees share an "overwhelming community of interest" with included employees – *is absolutely identical under both* Lundy Packing *and* Specialty Healthcare. In other words, the only flaw in the "overwhelming" test created in *Lundy Packing* is that it required anyone challenging a union-proposed unit to show that excluded employees shared an overwhelming community of interest with employees in the proposed unit. Yet this is the exact same standard that the Board requires in *Specialty Healthcare*.

[2] For this reason, the Board's argument that Dreyer's "has control over nearly all of the community-of-interest factors that the Board assesses" is irrelevant. While it is true that employers retain control over how workplaces are managed and organized, the effect of the overwhelming-community-of-interest test is to render these factors *de minimis*. Only if these factors align perfectly could they matter; otherwise, they are meaningless. Thus, as a practical matter, unless an employer runs its operations solely with the goal of managing the possible unions that could organize in the facility, its decisions in how to run its operations will be overwhelmed by any meager and superficial differences identified by a union. This Court already rejected such an approach in *Lundy Packing*; it should do so again here.

Thus, for the reasons that the Board's standard was rejected in *Lundy Packing*, the same standard must be rejected here. Consequently, when the Board argues that "Dreyer's provides no grounds for departing from the persuasive reasoning of the Sixth and D.C. Circuits" (Board Br. at 36), it betrays a lack of respect for the *mandatory* authority controlling the outcome of this case.

The Board and the Union both rely on this Court's language in *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531 (4th Cir. 1999) that an employer's burden is to show that a proposed bargaining unit is "utterly inappropriate," before this Court will set it aside. *Id.* at 534. Dreyer's takes no issue with this standard, only the Board's application of it. A unit approved using a standard that allows the extent of organization to be controlling, like the *Specialty Healthcare* standard, is "utterly inappropriate" because it violates an explicit directive of the NLRA. Because the "overwhelming community of interest" test allows the extent of organization to be controlling, *Lundy Packing*, 68 F.3d at 1581, any unit determined on the basis of that test is "utterly inappropriate." Indeed, *Sandvik* acknowledged that the issue in *Lundy Packing* was the exclusion of employees from a unit based on "meager differences" with the proposed unit, not any kind of presumption or lack thereof at the outset of the test. 194 F.3d at 538. In *Sandvik*, "the two divisions produce different products that each sells directly to its own customers," and "[n]othing in the record establishes that the MTD is essential to

the CPD's operation." *Id.* at 537. Here, on the other hand, the maintenance employees are indisputably essential to the production employees' ability to work (and vice versa, as there could be no jobs for maintenance employees if nothing was being produced on the lines).

Further, neither the Board nor the Union explains how extent of organization does not "dominate" the other factors under the overwhelming community of interest test. Under this Court's precedents, extent of organization can be neither controlling nor "dominant." *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978). Likewise, this Court has held that "the union will propose the unit it has organized." *Lundy Packing*, 68 F.3d at 1581 (quoting *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). If the Union's decision is driven by the extent of organization, and if the employer's burden is to show that excluded employees share an overwhelming community of interest with the employees selected by the Union, it is apparent as a practical matter that extent of organization is the dominant factor under the *Specialty Healthcare* test.

Finally, the Union misstates this Court's decision in *NLRB v. Enterprise Leasing*, 722 F.3d 609 (4th Cir. 2013). There, the Court was faced with a challenge to *Specialty Healthcare* that it did not need to consider because of other grounds to uphold the Board's decision. *Id.* at 628 ("We need not . . . even

address whether *Specialty Healthcare* is consistent with the NLRA or our decision in *Lundy Packing*."). Nevertheless, the Court noted in passing that "the overwhelming community of interest component of the community of interest standard may run afoul of our decision in *Lundy Packing*." *Id.* at 627 n.9. Somehow, the Union turned this Court's highlighting of the tension between *Specialty Healthcare* and *Lundy Packing* into a statement that "*Enterprise Leasing* . . . provides further affirmation that the *Specialty Healthcare* Board's adoption of the overwhelming community of interest standard is fully consistent with *Lundy Packing*." (Union Br. at 36.) This claim defies explanation.

B. The Board's Prior Precedents Do Not Provide Support for the Test Announced in *Specialty Healthcare*.

Rather than acknowledge the direct rejection of its "overwhelming community of interest" test by this Court, the Board and the Union attempt to show that the test has a historical pedigree in prior unit determination decisions. But their efforts in briefing here are no more persuasive than the Board's efforts in *Specialty Healthcare* itself. (*See* Dreyer's Br. at 48-50.) Despite all the bluster, neither the Board nor the Union points to a single case prior to *Specialty Healthcare* where the Board required a party seeking to expand a proposed unit to show that the excluded employees shared an overwhelming community of interest with the proposed unit.

In its brief, the Board cites six cases that used the phrase "overwhelming community of interest" between 1999 and 2010. (Board Br. at 27-28 & n.5.) Four of these six cases are simply decisions by one of the Board's 26 regional directors and not actually decisions of the Board itself. The need to cherry pick decisions from regional directors alone demonstrates the lack of historical support for the test announced in *Specialty Healthcare*. Of course, only the Board—not its regional directors—establishes Board policy in the first instance. *Cf. NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 443 (1965) ("When the Board so exercises the discretion given to it by Congress, it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it." (quotation marks omitted)).

The two actual Board cases cited by the Board fare no better. In *Lodgian, Inc.*, 332 NLRB 1246 (2000), the Board does not mention an "overwhelming" community of interest. The Board's opinion in this case is a one-paragraph denial of a request for review of a regional director's decision and includes no written analysis of the merits of the underlying decision. As in the four cases cited above, the only reference to an "overwhelming" community of interest in *Lodgian* comes in a regional director's opinion (attached as an "appendix" to the Board opinion). Again, a regional director's decision cannot be said to establish Board policy. *See Metro. Life Ins. Co.*, 380 U.S. at 443.

Finally, as Dreyer's noted in its initial brief, in *Laneco Construction Systems*, "the *employer argued*" that two groups of employees shared an overwhelming community of interests. 339 NLRB 1048, 1049 (2003) (emphasis added). Nowhere in *Laneco* does the Board endorse that standard or conclude that employers *must* show an "overwhelming" community of interest to defeat a proposed unit.[3]

In sum, there is precisely zero historical support for the Board's adoption of the overwhelming community of interest test. Instead of citing to any actual Board support for the decision, the Board instead relies on the opinion of the D.C. Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). It is true that the D.C. Circuit approved a test allowing exclusion of employees absent evidence of an overwhelming community of interest with included employees. *Id.* at 422. But the *Blue Man Vegas* analysis is flawed for two reasons. First, the

[3] The additional case cited by the Union, *Jewish Hospital Association*, 223 NLRB 614 (1976), suffers from the same flaw. As in *Laneco*, there is nothing in Board's opinion in *Jewish Hospital Association* to even suggest that the Board is adopting an "overwhelming community of interest" test. Rather, the Board noted that "***Employer asserts***, inter alia, that there is such an overwhelming community of interest between the service employees sought and the maintenance and technical employees that the only appropriate unit is an overall unit of service, maintenance, and technical employees." *Id.* at 617 (emphasis added). The fact that an *employer argues* that two groups of employees share an overwhelming community of interest says nothing about whether the *Board required* that the two groups share an overwhelming community of interest to be included in the same unit. In fact, the Board in that case mandated the inclusion of one group of employees in the unit because they did "not have a sufficient separate community of interest" and excluded another group because they did "not share a sufficient community of interest" with the excluded employees. *Id.* at 617, 619. Nowhere did the Board rely on an "overwhelming community of interest" in making its unit determination.

cases it cites for the historical use of the test – *Jewish Hospital Association* and *Lodgian* – do not actually support the use of the test, as discussed above.[4]

Second, and more importantly, the test directly conflicts with this Court's rejection of the "overwhelming community of interest" standard in *Lundy Packing*. Just as the Board does, the D.C. Circuit attempts to distinguish the test it approved from the test this Court rejected in *Lundy Packing* by pointing to the additional front-end community of interest requirement. *Id.* at 423 ("As long as the Board applies the overwhelming community-of-interest standard *only after the proposed unit has been shown to be* prima facie *appropriate*, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." (emphasis added)). As discussed above, however, this Court's decision in *Lundy* had nothing to do with the presence or absence of a finding that the unit was *prima facie* appropriate. Rather, it was based on the way in which the "overwhelming" test stacked the deck in favor of a union's proposed unit.[5]

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[4] The Sixth Circuit's decision in *Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013) does not cite any prior Board cases relying on the overwhelming community of interest test, nor does the Court even mention *Lundy*, much less try to distinguish it.

[5] The only historical basis for the use of an "overwhelming community of interest" standard is in accretion cases. As previously discussed, the issues in an accretion cases are almost the opposite of the issues presented in the initial determination of an appropriate bargaining unit. Historically, accretion was allowed—and the "overwhelming community of interest" standard found satisfied—only when the additional employees had "little or no separate group identity and thus [could not] be considered to be a separate appropriate unit." *See Lundy* (Continued)

C. The Court Should Not Defer to the Board's Argument that the *Specialty Healthcare* Test Merely Clarified the Law.

Despite the lack of historical support for the test announced in *Specialty* Healthcare and despite the fact that it conflicts with circuit precedent, the Board nevertheless asks this Court to defer to its determination that it was merely clarifying prior law, rather than substantively changing it. No such deference is owed to the Board. This Court is competent to determine whether a rule articulated by the Board is consistent with prior precedent—just as it is competent to determine whether a rule articulated by a district court is consistent with precedent. Just as no deference is owed to the district court on such a pure question of law, no deference is owed to the Board.

The Board cites *First National Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472 (7th Cir. 1999), in support of its arguments that courts defer to agencies when determining whether the agency clarified or modified prior

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Packing, 68 F.3d at 1581. Presumably here, however, neither the Board nor the Union contends that under the *Specialty Healthcare* standard the production employees in the Dreyer's facility would not constitute a separate appropriate bargaining unit. Quite to the contrary. Indeed, under the Board's announced *Specialty Healthcare* standard it is hard to conceive of a single job classification that would not constitute its own separate appropriate bargaining unit. This is why this Court observed in *Lundy Packing* that the "overwhelming" standard used here can and does impermissibly function to give controlling effect to a union's organizing targeting. Certain members of the Board may prefer that so-called "minority" unionization become legal in order to forestall further declines in private unionization. *See generally* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005). Be that as it may, "minority" unionization is not the law. Not only is it inconsistent with section 9(c)(5) of the Act—adopting it *sub rosa* through an unacknowledged change in the law is inconsistent with the Board's obligation to provide transparent and reasoned explanations for its policymaking.

precedents. But the Seventh Circuit acknowledged that its position on this issue is relatively unique: other courts do not show "deference to administrative agencies, which is in stark contrast to this court's position." Id. at 479. Case law from other courts bears out the Seventh Circuit's point. *See, e.g.*, *United States v. Diaz*, 245 F.3d 294, 304 (3d Cir. 2001) ("The mere fact that an amendment is referred to as a clarification or a revision is ordinarily of slight import to our analysis. Rather, it is our own interpretation . . . that determines whether the Amendment clarified that interpretation or substantively changed it." (quotation marks and punctuation omitted)); *Smith v. Scott*, 223 F.3d 1191, 1995 (10th Cir. 2000) ("An agency's statement that an amendment is nothing more than a clarification cannot be accepted as conclusive because such a result would enable the agency to make substantive changes in the guise of clarification." (internal quotation marks and alterations omitted)); *Detroit Edison Co. v. EPA*, 496 F.2d 244, 249 (6th Cir. 1974) ("The particular label placed upon a regulation is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." (internal quotation marks and alterations omitted)). In each of these cases, the court disregarded an agency determination that an amendment was a clarification and determined the issue for itself. Indeed, even the Seventh Circuit has applied these principles inconsistently. See *Pettibone Corp. v. United States*, 34 F.3d 536, 542 (7th Cir. 1994) ("In 1994 the IRS changed its view. We do not

accept its assertion that the 1994 version merely restates and clarifies the 'real' meaning of the older regulation.").

Further, because *Specialty Healthcare* directly conflicts with *Lundy Packing*, it cannot be considered a clarification: "an amendment that conflicts with circuit precedent is a substantive amendment, even if it is designed merely to elucidate the original intent" of the agency. *United States v. Munn*, 595 F.3d 183, 194 (4th Cir. 2010) (quotation marks omitted); see also *United States v. Flemming*, 617 F.3d 252, 268 (3d Cir. 2010) ("Generally, if an amended guideline and commentary overrule a prior judicial construction of the guidelines, it is substantive; if it confirms our prior reading of the guidelines and does not disturb prior precedent, it is clarifying." (quotation marks omitted)). Because endorsing *Specialty Healthcare* would require this Court to overrule its *Lundy Packing* decision, the rule is by definition substantive, rather than clarifying. Thus, no deference is owed to the Board's determination that the *Specialty Healthcare* rule is a clarification.

Failing to defend the merits of the *Specialty Healthcare* standard, the Board falls back on *Chevron* deference to attempt to insulate the decision from review. But *Chevron* deference cannot sustain an agency decision when the agency changes the law without even acknowledging the change, much less providing a reasoned explanation for it. *See, e.g.*, *Sea Robin Pipeline v. FERC*,

127 F.3d 365, 369 (5th Cir. 1997) ("The fundamental precept that permits this deferential standard of review [under *Chevron*] is that an agency must cogently explain why it has exercised its discretion in a given manner and must supply a reasoned analysis for any departure from other agency decisions.") (quotation marks omitted). Indeed, a decision changing the law without acknowledging the change is *per se* arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis."). Of course, "an agency's statutory interpretation that conflicts with the agency's previous interpretation of the same statute" is not entitled to *Chevron* deference. *Hanauer v. Reich*, 82 F.3d 1304, 1311 n.4 (4th Cir. 1996).

Thus, even if the Court were persuaded that the decision to overrule fifty years of precedent in *Specialty Healthcare* was wise, the Court cannot endorse the Board's decision to do it *sub silentio*. The Board failed to acknowledge what it did in *Specialty Healthcare*, and courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 43.

D. Prior Board Decisions Would Have Been Resolved Differently Under the "Overwhelming Community of Interest" Test.

The Union (but not the Board) argues that none of the pre-*Specialty Healthcare* decisions highlighted by Dreyer's would have been decided differently

under the "overwhelming community of interest" test. This claim cannot withstand scrutiny.

The Union focuses on the similarities between the included and excluded employees in these cases, while ignoring their differences. But under the "overwhelming community of interest" test, we are told that it is these differences (even small differences) that matter most; unless the interests of two groups of employees "overlap almost completely," separate units are appropriate. *Specialty Healthcare*, 357 NLRB No. 83 at 11 (quoting *Blue Man Vegas*, 529 F.3d at 422). The Union cannot credibly claim that the employees' interests overlapped almost completely in those cases:

- *Buckhorn, Inc.*, 343 NLRB 201 (2004): The maintenance employees earned substantially more ($12.25 to $18.25 per hour) than the production employees ($10.25 and $12.75 per hour). Further, the employees in the proposed unit worked in a different administrative department, had higher skills, and received additional training. *Id.* at 202-03. Yet the Board held that these factors were "outweighed by all the other factors" showing a community of interest between the two groups. *Id.* at 204. Nowhere does the Board suggest that the two groups shared an "overwhelming community of interest" or that their interests "overlap[ped] almost completely.

- *Peterson/Puritan, Inc.*, 240 NLRB 1051 (1979): The line mechanics had different shift times than production employees, were supervised by separate supervisors, "perform[ed] essentially mechanical maintenance rather than production work," received higher wages, and wore different uniforms. *Id.* at 1051. Despite this, the Board held that a separate unit of only line mechanics was inappropriate. *Id.* Again, nowhere does the Board suggest that the two groups shared an "overwhelming community of interest" or that their interests "overlap[ped] almost completely.[6]

Thus, when the Board argues that "when the Board applied a similarly-heightened standard under a different name, the Board regularly granted requests to expand the unit," it misses the point. While the Board can claim that its prior standard was "similar" to the *Specialty Healthcare* standard, the actual decisions made by the Board refute that argument.

[6] The Union also argues that the unit proposed in *Peterson/Puritan* was a "'fractured unit' of the sort that *Specialty Healthcare* held inappropriate." (Union Br. at 26.) The apparent suggestion is that because the union in that case sought to represent only the line mechanics, rather than the entire maintenance department, the unit was not appropriate. But the Board's decision in that case had nothing to do with the alleged "fractured" unit. The Board did not rely on similarities between the line mechanics *and other maintenance employees*; it relied on similarities between line mechanics *and production employees*. Despite the fact that there is no way that the Board could have held that the line mechanics and the production employees shared an overwhelming community of interests in light of their differences, the Board nevertheless held that the separate unit was inappropriate.

Here, too, the Board and the Union focus almost exclusively on the differences between the two groups of employees while giving virtually no consideration to the many similarities between them. For example, the interchange between production and maintenance employees is immense, with nearly half of the maintenance employees previously serving as production workers. At a minimum, the production employees' community of interest includes the ability to transition into maintenance positions. A bargaining unit that includes only maintenance workers could very well preclude non-union production workers from being able to apply for those positions in favor of outside applicants. Moreover, even on a day-to-day basis, the employees in the proposed maintenance unit work side by side with production workers to diagnose and repair machinery, to perform routine maintenance, at the shift start-up, at the end-of-shift teardown, and in a variety of other ways.[7] (*See* Dreyer's Br. at 19-21.) The Board largely ignores the very daily interaction between production and maintenance workers.

The Board need not consider these similarities under the *Specialty Healthcare* test because the test is weighted so heavily in favor of a union's proposed unit. But under the Board's prior precedents, such similarities are

[7] For this reason, the Board's focus on the numerical size of the unit (Board Br. at 46-47) is irrelevant. Dreyer's is not complaining here that the number of employees in the unit is too low to justify a bargaining unit. Rather, a unit composed exclusively of maintenance employees is inappropriate because it fractures the workforce by splitting up employees who (1) need to work together efficiently on a day-to-day (and even minute-to-minute) basis and (2) share virtually identical terms of employment.

relevant to the determination of the appropriate unit. This further shows how different the Board's analysis proceeds under its new test.

E. This Case Should Be Dismissed or, in the Alternative, Remanded to the Board.

The Board argues in a footnote that this Court erred in the second *Lundy* case, *NLRB v. Lundy Packing Co.*, 81 F.3d 25 (4th Cir. 1996) (*Lundy Packing II*), when it terminated the case rather than remanding it to the Board for further proceedings. The only authority that the Board offers for the proposition that it retains jurisdiction of the representation proceeding is a Board opinion. *See Freund Baking Co.*, 330 NLRB 17 (1999). But the Board's jurisdiction is an issue for this Court to determine, not for the Board itself to attempt to dictate to the Court. *See Lundy Packing II*, 81 F.3d at 26 ("[T]he attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction.").

Even in *Freund Baking*, the Board conceded that its jurisdiction is limited and dictated by the Court. *Freund* claims that the Board may "resume processing the representation case *in a manner consistent with the rulings of the court*." 330 NLRB at 17 n.3 (emphasis added). As discussed in both Dreyer's opening brief and this brief, this case is squarely controlled by *Lundy Packing*. Consequently, should the Court reach the merits of the case, it should decline the

Board's request to remand for further proceedings and instead "terminat[e] all administrative proceedings relating to the case." *Lundy Packing II*, 81 F.3d at 26.

Alternatively, the Court should remand this case to the Board for further proceedings with a directive that it apply the correct test. Absent overturning this Court's decision in *Lundy Packing*, which no party to this case has requested, the Court cannot approve the test used by the Board in this case. When an agency uses an incorrect legal standard to decide a case, an appellate court cannot apply the correct standard for the agency in the first instance. *See, e.g.*, *Menghesha v. Gonzales*, 450 F.3d 142, 147(4th Cir. 2006) ("[W]here, as here, the [immigration judge] misapplies the law in evaluating a request for asylum, the appropriate remedy is to remand so that the agency may apply the correct legal standard in the first instance."); *Raven Services Corp. v. NLRB*, 315 F.3d 499, 504 n.8 (5th Cir. 2002) ("Where the NLRB applies an incorrect legal standard, . . . we cannot enforce its order.").

As discussed in Dryer's opening brief, the Court should refuse to enforce the Board's order as contrary to the law of this circuit and dismiss the petition with prejudice. (Dreyer's Br. at 62-64.) Absent such a determination, at the very least the Court must remand the case to the Board to apply the correct legal standard in the first instance.

CONCLUSION

For the reasons set forth above and in its opening brief, Dreyer's respectfully requests that this Court grant review and deny enforcement of the Board's November 5, 2014 Decision and Order and dismiss this case.

Dated: March 10, 2015.

s/ Bernard J. Bobber

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to requirements of Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure. This brief is 5,647 words, excluding those portions of the brief excluded by Rule 32(a)(7)(B)(iii).

Dated: March 10, 2015.

s/ Bernard J. Bobber
Bernard J. Bobber

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I hereby certify that the foregoing document was served on the counsel of record by using the CM/ECF system.

Dated: March 10, 2015.

s/ Bernard J. Bobber
Bernard J. Bobber